U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHIRLEY A. NANCE and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, OH

Docket No. 00-335; Submitted on the Record;
Issued March 2, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim constituted an abuse of discretion; and (2) whether the Office abused its discretion in denying appellant's request for an oral hearing.

The only decisions before the Board are the Office's June 22 and August 26, 1999 nonmerit decisions denying, respectively, appellant's application for further review of its September 2, 1998 decision and her request for an oral hearing. Because more than one year has elapsed between the issuance of the Office's September 2, 1998 merit decision and September 17, 1999 the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the September 2, 1998 decision.[1]

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim on June 22, 1999, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The Federal Register dated November 25, 1998 advised that, effective January 4, 1999, certain changes to 20 C.F.R. Parts 1 to 399 would be implemented. The revised Office procedures pertaining to the requirements for obtaining a review of a case on its merits under 5 U.S.C. § 8128(a), state as follows:

(b) The application for reconsideration, including all supporting documents must:

> Be submitted in writing; (2) set forth arguments and contain evidence that either: (i) shows that Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously

[1] *See* 20 C.F.R. § 501.3(d)(2).

> considered by Office or (iii) constitutes relevant and pertinent new evidence not previously considered by Office.[2]

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[3] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.[4] When a claimant fails to meet one of the above-mentioned standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[5]

In support of her reconsideration request appellant submitted several letters and faxes between appellant, her representative and the Office regarding a potential change in treating physicians and, a request for physical therapy or a pain management program. Two reports from Dr. Hal S. Blatman, a Board-certified physiatrist, failed to address any disagreement with the schedule award being paid. This evidence, therefore, does not constitute relevant or pertinent new medical evidence or constitute relevant legal argument not previously considered by the Office. Consequently, the evidence submitted in support of appellant's request for reconsideration of the September 2, 1998 Office merit decision does not constitute a basis for reopening her claim for further merit review.

Therefore, the Office did not abuse its discretion by denying appellant's request for a further review of her case on its merits under 5 U.S.C. § 8128(a) on June 22, 1999.

The Board further finds that the Office acted within its discretion in denying appellant's request for an oral hearing.

Section 8124(b)(1) of the Act provides in pertinent part as follows:

> "Before review under § 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of issuance of the decision to a hearing on his claim before a representative of the Secretary."[6]

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[2] 20 C.F.R. § 10.606(b)(1),(2)

[3] 20 C.F.R. § 10.607(a).

[4] *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[5] *See Mohamed Yunis, supra* note 4; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[6] 5 U.S.C. § 8124(b)(1)

The Office's procedures implementing this section of the Act are found in the Code of Federal Regulations at 20 C.F.R. § 10.616(a). This paragraph notes:

> "A claimant, injured on or after July 4, 1966, who has received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by the postmark or other carrier's date marking) of the date of the decision for which a hearing is sought. The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision."

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[7] In this case, since appellant had previously requested reconsideration and received a June 22, 1999 decision of that request, she was not entitled to a hearing under section 8124 as a matter of right.[8]

The Office, however, in its discretion, considered appellant's hearing request in its August 26, 1999 decision and denied the request on the basis that appellant could pursue her claim by requesting reconsideration by the Office and by submitting additional evidence supporting that she had greater than a 17 percent impairment of her right upper extremity.

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.[9] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

[7] *Rebel L. Cantrell*, 44 ECAB 660 (1993) (untimely); *Mary B. Moss*, 40 ECAB 640 (1989) (untimely); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982) (request for a second hearing).

[8] *See* 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a); *Johnny S. Henderson, supra* note 7.

[9] *Daniel J. Perea*, 42 ECAB 214 (1990).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated August 26 and June 22, 1999 are hereby affirmed.

Dated, Washington, DC
March 2, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member